IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,854

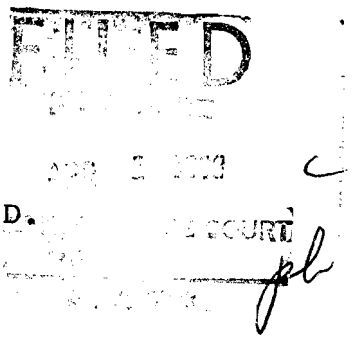
DEPARTMENT OF PROFESSIONAL REGULATION

Petitioner,

vs.

PEDRO F. BERNAL, M.D.

Respondent.



On Review of a Petition to Invoke
the Discretionary Jurisdiction
of the Supreme Court
to Review
a Decision of the Third District Court of Appeal
Upon Certification of Conflict

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS
(Areas omitted in Petitioner's Brief on the Merits)

The parties appeared on January 11, 1986 before the Board for consideration and acceptance or rejection of the Stipulation (R:298-304). [1/] No questions were directed to Dr. Bernal to ascertain the facts. Without discussion the members of the Board voted to reject the Stipulation and proposed that Respondent relinquish his license. Moreover, Chairman J. Darrell Shea restrained his counsel from presenting a closing statement (R:303).

1 / R - Record on Appeal.

The hearing officer found that respondent violated section 458.331 (1)(t) only to the extent that he unlawfully delegated the functions of a physician to unlicensed persons. (R:249).

In determining the appropriate penalty the Hearing Officer gave particular consideration to the nature of the violations; to the fact that there was no evidence of harm to any patient; and to the fact that Dr. Bernal appeared to be an elderly man who was not in the best of health (R:250). He also found a lack of candor in Respondent, but apparently gave no significance to it (R:372).

The Department moved the Board to increase the penalty to a one-year suspension, a one-year period of probation and a $500.00 fine (R:334). Respondent moved that the Board adopt the Recommended Order as its Final Order (R:318).

The Board adopted the findings of fact and the conclusions of law set forth in the Recommended Order but, with two dissents, one by Chairman Dr. James N. Burt and the other by Dr. Emilio Echevarria, rejected the recommended penalty and revoked Respondent's license outright (R:260; R:353-354).

Together with his Notice of Appeal, Dr. Bernal filed with the Department a Motion for Stay from Enforcement of Revocation. Identical Motion was simultaneously filed with the Third District and the Department filed its Petition to Avoid Stay.

On April 2, 1987 Counsel for Respondent received a notice from the Department, dated April 1, advising that the Motion for Stay would be presented to the Board on April 4, in Tampa (R:367).

Dr. Bernal's Counsel requested a continuance due to his inability to appear upon such short notice. However, the Board ignored the request, heard the matter and denied the Motion for Stay precluding Respondent's right to legal representation (R:355-366, 368). Ironically the day before, April 3, the Third District had granted the Stay.

SUMMARY OF THE ARGUMENT

The guist of the conflict resides in that the Board's action substituting its own criteria of the penalty in place of that recommended by the hearing officer, without justification, was a manifest and flagrant abuse of its discretion in violation of Fla. Statutes section 120.57 (1)(b)(10).

The Third District properly concluded that Fla. Statutes Chapter 120 requires from the Board more than an explanation to reduce or increase the recommended penalty. The action needs be justified; the reasons must be stated with particularity by citing to the record and neither ground asserted by the Board passes muster under the statute.

Clearly the Board considered facts extraneous to the record, mainly Respondent's reasonable skill and safety, and its decision was reached at without justification but as the result of a preconceived judgment based mostly in ethnical underlying factors.

Contrary to Petitioner's contention, the Third District did not substitute its judgment for that of the Board, much less did the court decide the proper penalty itself but, instead, soundly applied section 120.57 (1)(b)(10) in finding that the Board itself violated the statutory provision by improperly increasing the penalty. As it follows, the hearing officer's recommended penalty, by operation of law, could not be disturbed and had to become firm. The Third District, accordingly, reversed the penalty and correctly remanded the cause for the implementation of the recommendation of the hearing officer. Respondent, therefore, respectfully requests that the Third District's opinion be affirmed.

A R G U M E N T

I

THE SCOPE OF APELLATE REVIEW IN ADMINISTRATIVE PENALTY DETERMINATIONS

The Department's loquacious argument amounts to entertain the proposition that section 120.57 (1)(b)(10) Fla. Statutes extends to the Board a free road ahead to arbitrarily impose whichever penalty it deems, regardless of due process requirements and whether or not justified, as long as it explains its reasons. More simply stated, that the Board is empowered to abuse its discretion.

However, section 120.57(1)(b)(10), Fla. Statutes (Supp.1986) amended the then existing statute adding the requirements of "stating with particularity" its reasons and, more importantly, "by citing to the record in justifying the action", to trigger the agency's power to reduce or increase the recommended penalty.

Futhermore, it is well established that in a license revocation proceeding, the agency has the burden of proving the allegations of its adminstrative complaint justifying a license revocation. Associated Home Health Agency, Inc. v. State Dept. of Health and Rehabilitation Services, 453 So. 2d 104 (Fla. 1st DCA 1984).

> "Justified: Done on adequate reasons sufficiently supported by credible evidence, when weighed by unprejudiced mind, guided by common sense and by correct rules of law. Selectman of Wakefield v.

Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 160 N.E. 427, 430". (Black's Law Dictionary)

"Justify:... 1. to show to be just, right, or in accord with reason.... 1. Law a) to show an adequate reason for something done....(Webster's New-World Dictionary, Second College Edition)

The crux in the instant case is not whether the Board explained its reasons but whether the Board acted under an arbitrary impulse, whim or caprice or was justified in increasing the penalty. The Third District held that neither ground asserted by the board passes muster under the statute.

In Hutson v. Casey, 484 So. 2d 1284 (Fla. 1st DCA 1986), the First District interpreted section 120.57 (1)(b)(10), Florida Statutes (Supp. 1986) as follows:"...The apparent purpose of the above statute, as amended, is to provide some assurance that the agency has gone through a thoughtful process of review and consideration before making a determination to change the recommended penalty..."

To hold otherwise, as the Department undoubtedly wishes, would amount to completely disregard the Legislature's intent in requiring the additional elements for departure from the Hearing Officer's recommended penalty. In other words, the whole procedure would be tantamount to no more than the creation of an illusion of due process.

Additionaly, the action of arbitrarily or with no justification revoking Respondent's license and depriving him of the opportunity to earn a livelihood is quasi criminal and

equivalent to inflicting cruel and unusual punishment and deprives Respondent of due process of law in violation of the VIII and XIV Amendments to the Constitution of the United States.

II

THE BOARD'S INCREASE IN PENALTY BASED UPON THE SEVERITY OF THE OFFENSE WAS IMPROPER

The seriousness of the offense ground is legally insufficient. It was evaluated by the Hearing Officer and as the Third District very well expressed it "simply reflects the Board's difference of opinion or disagreement with the assessment of the seriousness of the offense by the Hearing Officer, made not as a general proposition, but as tailored to the situation of Dr. Bernal in particular".

Petitioner is absolutely right in assuming that Respondent will point to Van Ore v. Board of Medical Examiners, 489 So. 2d 883 (Fla. 5th DCA 1986) but Respondent points also, as the Third District did, to Hutson v. Casey, 484 So. 2d 1284 (Fla. 1st DCA 1986). The Third District was correct in stating that "a mere disagreement of this kind does not, under our statute, justify a substitution of the judgment of the Board for that of the Officer".

The Third District concluded in accord with Judge Nimmon's dissent in Britt v. Department of Professional Regulation, 492 So. 2d 697, 700 (Fla. 1st DCA 1986), see also Rotstein v.

Department of Professional Regulation, 397 So. 2d 305, 308 (Fla. 1st DCA 1980) (Wentworth, J., dissenting to original opinion).

The decision in Bernal is consistent with Van Ore, with Hutson and with Judge Nimmon's dissent in Britt and is in compliance with the requirements of section 120.57 (1)(b)(10), Florida Statutes (1986), while the majority opinion in Britt ignores the statute's apparent purpose, especially in light of the patent arbitrariness of the Board in Bernal.

As the Department points out there is no dispute that the Board explained its reasons for increasing the penalty. Petitioner repeatedly, and quite candidly, uses the terms "explanation", "articulate the reasons" and "state why they disagree" when referring to the Board's limitations in changing the penalty recommended by the Hearing Officer. None of those actions alone is statutorily sufficient. The Board would have better served the public and itself by "justifying the action".

It is well established that in a license revocation proceeding, agency has burden of proving allegations of its administrative complaint justifying a license revocation. Associated Home Health Agency, Inc. v. State Dept. of Health and Rehabilitation Services, 453 So. 2d 104 (Fla. 1st DCA 1984).

The arbitrariness of the Board became patent when same refused to hear Dr. Bernal's case at the time it considered the stipulation entered between the Department and Respondent (R:298-304). Without a scintilla of discussion the Board voted to

reject the stipulation. Counsel for Respondent attempted to make a closing statement, but Chairman, J. Darrell Shea, cut him short stating: "No, we aren't going to hear the case..."(R:303)

Thereafter, in considering the recommendations of the Hearing Officer, the Board again demonstrated its viciousness. While Counsel for the Department moved for an increased penalty, said increase was not in the form of revocation, it was a suspension for a period of one year (R:334). But instead of following any one of the alternatives proposed, to wit: 1) Stipulation with the Department providing for a reprimand and two years probation; 2) Hearing Officer's Recommended Order providing for a 90 days suspension and 2 years probation; or 3) Department's Counsel motion for a one year suspension and one year probation, the Board substituted its own judgment by administering a pre-established, inordinately and most severe penalty: Revocation of Appellant's license. Paradoxical as it may appear, the Department is now acting against its own stipulation and against its motion to increase the penalty.

It is clear that the Board members, in violation of Florida Statutes Section 120.57 (1)(b)(10), considered facts not in the record, mainly Appellant's reasonable skill and safety, and their discussion was tainted with ethnical underlying factors:

> ".... Dr. Skinner:.... and that there were severe deficiencies which occurred in the course of this Doctor's practice. And that the skill and safety-to preserve

the safety to the patients of Florida, that a different penalty must be imposed by this Board, other than the one recommended....(R:343) ....Dr. Brunner: I want him to quit practicing but I don't want to revoke him.... Dr. Echevarria:... But I Agree with you.... Dr. Brunner: I would be copping out if I went for suspension until he could show us he could practice with reasonable skill and safety... Dr. Brunner: .... He is 75 years old, and there is a grave question to me, interpreting everything I've heard today, and reading this record, that he is mentally alert enough to practice with reasonable skill and safety....(R:346-347). Dr. Katims: Does he speak English? He doesn't speak English. Give it to him in Spanish. Dr. Shea: He doesn't even know what is going on....(R:349). Ms. Lannon: I want to point out to the Board that the charges here all relate to delegating practice to unlicensed persons. This Doctor has not been charged with inability to practice with reasonable skill and safety. He has not been charged with malpractice as to acts that he personally performed; but with malpractice to the extent that he delegated - I want to be sure that in the penalty phase the Board is focused on charges in the findings in this recommended order and not going beyond that....(R:349-350)....Dr. Shea: We have talked it out. This fellow has been sitting here. He is alive and well. I haven't heard him speak anything. Do you speak English?..."(R:350).

Respondent was charged with aiding three doctors who <u>were licensed</u> to practice medicine in a foreign country, but were not licensed to practice in the State of Florida (R:245). There was no evidence of harm to any patient nor evidence of any complaint against Dr. Bernal's skills and safety. Respondent is a 75 years

old man not in the best of health (R:250). Respondent had practiced medicine, first licensed in Cuba in 1945 and thereafter licensed in the State of Florida in 1980, for a period of over 41 years (R:17). At the time he was licensed in Florida he was older than most people who are initially licensed in Florida, which, quoting the member of the Board Dr. Stuart, is an unusual accomplishment (R:347-348). It is clear that Chairman Dr. Burt and member Dr. Echevarria took carefull consideration of these facts when voting against revocation.

Respondent is a first offender who in his 41 years in practice has never before been involved in any difficulty with any Authority, but the Board, instead of considering reprimand and leniency treated him as the most abominable of doctors.

Even at the proceeding in which the Board considered Respondent's Motion for Stay its members conducted themselves as Gods descended from Mount Olympus, airing their anger by detracting Respondent's counsel for failing to accept their invidious ruling and representing his client as best he could. Several members of the Board and the Bar went to the extreme, not only of openly grossly denostating said Counsel in absentia in a public hearing, but, in addition, took part in a conspiracy to attempt to cause damage to his reputation and to his profession, which conduct very probably amounted to slander per se (R:355-366):

> ".... Dr. Santelices:... We made him an offer to give in his license, to voluntarily relinquish his

license; and by advise of his Lawyer, which was very poor, he said No. I think this Lawyer is playing with us at the expense of this little old man, and I don't think we should let him do it....(R:360).... Dr. Katims: Mr. Chairman, I think the record should also reflect, I recognize that this Lawyer, for all practical purposes, has spat in the eye of the Board....(R:362).... Dr. Santelices: I have a legal question that has nothing to do with medicine. It has to do with law. Are, just like doctors are, by law, obliged to report doctors who are committing gross malpractice, are you gentlemen and ladies obliged to do the same?....(R:364)....Ms. Lannon: Well, let me just say, without suggesting what anyone should do, that anyone can file a complaint....(R:365) Dr. Shea: Is there such a thing as an anonymous complaint?....Mr. Lamb: But I think anonymous complaints are accepted by the Bar....(R:365).... Dr. Skinner: ....Could the Board write a letter to the bar, expressing our serious concern, that this seems to be happenning?...."(R:366).

The Board's "explanation" clearly lacked justification.

III

THE COURT DID NOT ERR IN STRIKING THE BOARD'S FIRST REASON FOR INCREASE OF PENALTY

In finding the first ground legally insufficient the Third District noted that the hearing officer had taken the lack of candor into consideration and correctly found that the Board's reliance on said point amounted to a mere disagreement with the recommendation, which may not form the basis of an increased penalty. Hutson v. Casey, 484 So. 2d 1284 (Fla. 1st DCA 1986).

Even though the Department goes on a long journey to assert that criminal procedures are not applicable to administrative disciplinary proceedings it fails to address the point that Dr. Bernal was not charged with the lack of candor offense and that, as a general proposition, said conduct "may not be the subject of an increased penalty if he is nevertheless found guilty" of the offense charged and that license revocation proceedings are quasi-criminal in nature State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. SC 1973). The Third District's decision on this point does not conflict with any other. In its sound evaluation of this point the Third District found analogous and most persuasive: City of Daytona Beach v. Del Percio, 476 So. 2d 205 (Fla. 1985); Dixon v. State, 513 So. 2d 1378 (Fla. 3d DCA 1987); Beauvais v. State, 475 So. 2d 1342 (Fla. 3d DCA 1985); Evrard v. State, 502 So. 2d 31 (Fla. 4th DCA 1986); Spivey v. State, 481 So. 2d 100 (Fla. 3d DCA 1986).

IV

THE THIRD DISTRICT DID NOT ERR IN DECIDING THE APPROPRIATE PENALTY TO BE IMPOSED

The Third District correctly reversed the penalty imposed by the Board and remanded the cause for the implementation of the penalty recommended by the hearing officer.

As stated in the Summary of the Argument, contrary to Petitioner's contention, the Third District did not substitute

its judgment for that of the Board, much less did the court decide the proper penalty itself but, instead, soundly applied section 120.57 (1)(b)(10) in finding that the Board itself violated the statutory provision by improperly increasing the penalty and as it follows, since the Board adopted the findings of fact and law, the hearing officer's recommended penalty, by operation of law, could not be disturbed and had to become firm. The Third District, accordingly, reversed the penalty and remanded the cause for the implementation of the recommendation of the hearing officer. Respondent, therefore, respectfully requests that the Third District's opinion be affirmed.

C O N C L U S I O N

Based on all of the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was mailed to Lisa S. Nelson, Esq., Department of Professional Regulation, 130 North Monroe Street, Tallahassee, Florida 32301, this 31st day of March, 1988.

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